

*Not To Be Published:*

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF IOWA  
WESTERN DIVISION**

DOCTOR JOHN'S, INC., an Iowa  
Corporation,

Plaintiff,

vs.

CITY OF SIOUX CITY, IOWA,

Defendant.

No. C 03-4121-MWB

**ORDER REGARDING  
THE DEFENDANT'S MOTION TO  
CLARIFY ISSUES FOR BENCH  
TRIAL**

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This matter comes before the court pursuant to the defendant City's January 12, 2007, "Motion to Clarify" (docket no. 170), in which the City asks the court "to clarify the scope of the evidence relevant to the January 26, 2007, bench trial on the constitutionality of the City's ordinances." In its supporting brief, the City explains that, after the rulings on the second round of summary judgment motions and the bifurcation of the proceedings, the parties expected that the bench trial would encompass both "constitutionality" and "applicability" issues, while they expected that the subsequent jury trial would concern "damages" issues only. The City explains that, as a consequence of this understanding, the parties have submitted proposed witness and exhibit lists for the January 26, 2007, bench trial that contain some evidence that is relevant only to "applicability" issues. The City explains, further, that after the December 20, 2006,

ruling (docket no. 153) clarified that the bench trial concerns only “constitutionality” issues, and that the jury will determine “applicability” and “damages” issues in a subsequent proceeding, it appears that much of the evidence that the parties are marshaling for the bench trial may not be relevant to matters actually at issue in the bench trial. Under these circumstances, the City asks the court to use the upcoming final pretrial conference to clarify the scope of the evidence relevant to the January 26, 2007, bench trial to assist the parties in excluding witnesses and evidence that pertain only to issues that will be heard in the subsequent jury trial. The City opines that doing so will “likely shorten the January 26[th] trial.”

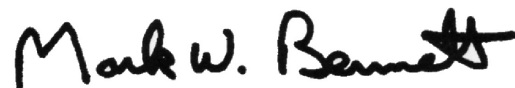
The City’s motion for “clarification” is untimely. Construed as a Rule 60(b) motion for relief from an order, the City’s motion should have been filed “within a reasonable time . . . after the . . . order . . . was entered. . . .” FED. R. CIV. P. 60(b). Under the circumstances presented here, a motion for clarification of the December 20, 2006, ruling that was not filed until more than three weeks after entry of the ruling was not filed “within a reasonable time.” Similarly, pursuant to the August 17, 2006, Order Setting Bench Trial (docket no. 141), motions concerning evidentiary issues were to be filed “at least **14 days** before the FPTC,” which is currently set for January 17, 2007, to afford the opposing party the opportunity to respond before the FPTC. *See* Order (docket no. 141) at 5-6 (emphasis in the original). Thus, the City’s evidentiary motion, filed just five days before the final pretrial conference, is untimely. Moreover, the court does not believe that there really should be any confusion about what issues are for the court to determine in the bench trial, at least not after the court’s December 20, 2006, ruling on the scope of the right to jury trial. Nevertheless, in order to make the final pretrial conference as beneficial as possible, and notwithstanding that the plaintiff has not yet had the opportunity to respond to the City’s request for clarification, the court finds that it should address at the

earliest opportunity the parties' apparent confusion over the issues to be tried in the January 26, 2007, bench trial. Hence, this written ruling.

The December 20, 2006, ruling should have made clear that the "constitutionality" question for the court to determine in the January 26, 2007, bench trial, in the context of the broad constitutional challenge by Doctor John's to the City's "adult entertainment businesses" ordinances, is the determination of the motivation of the City in enacting the ordinances in question, that is, whether the ordinances were "content neutral" or "content based" (*i.e.*, based on a personal or political animus unrelated to a governmental function). That determination includes determination of the credibility of the City's representatives on the motivation for the ordinances. This "content neutral" or "content based" determination will determine the level of scrutiny applicable to determine the constitutionality of remaining "non-media" provisions of the January 2004 ordinances and the remaining "media" provisions of the December 2004 ordinances on which the court has thus far declined to make a "constitutionality" determination. "Applicability" issues, on the other hand, are fact issues related only to damages relief, not "constitutionality" or "equitable relief" issues, and thus, are proper for the jury to determine. The "applicability" and "damages" issues will be determined in the jury trial set for March 5, 2007.

**IT IS SO ORDERED.**

**DATED** this 13th day of January, 2007.

A handwritten signature in black ink that reads "Mark W. Bennett". The signature is stylized with a large, looped "M" and a cursive "Bennett".

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MARK W. BENNETT  
U. S. DISTRICT COURT JUDGE  
NORTHERN DISTRICT OF IOWA